

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESSIE MENDOZA,

Defendant.

Case No.: 2:16-cr-00324-LRH-GWF

**FINDINGS &
RECOMMENDATIONS**

Re: Motion to Suppress (ECF No. 36)

This matter is before the Court on Defendant Jessie Mendoza's Motion to Suppress (ECF No. 36), filed on February 17, 2017. The Government filed its Response (ECF No. 41) on March 3, 2017, and Defendant filed his Reply (ECF No. 42) on March 10, 2017. The Court conducted an evidentiary hearing on April 5, 2017 regarding whether the police lawfully stopped the vehicle occupied by Defendant Mendoza on October 22, 2016. Following that stop Defendant Mendoza was arrested and his cell phone was seized. The Court declined to conduct a broader evidentiary hearing requested by Defendant pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978) because it was doubtful that Defendant had satisfied the threshold showing required to obtain such a hearing. The Court authorized the parties to file supplemental briefs as to whether a *Franks* evidentiary hearing is warranted. Defendant filed his Supplemental Motion to Suppress (ECF No. 63) on April 20, 2017. The Government filed its Response (ECF No. 64) on April 28, 2017.

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BACKGROUND

1. October 21, 2016 Search Warrant for Buccal Swab.

On October 21, 2016, Detective Justin Beveridge of the Las Vegas Metropolitan Police Department (“LVMPD”) applied to a Clark County, Nevada justice-of-the-peace for a search warrant to obtain a buccal swab or blood sample from Defendant Jessie Mendoza. *Motion to Suppress* (ECF No. 36), *Exhibit B, October 21, 2016 Search Warrant Affidavit*. The purpose of the warrant was to collect Defendant’s DNA and compare it to DNA found on articles relating to a robbery. Detective Beveridge stated that a series of armed robberies of EZ Pawn stores had begun on March 12, 2016. As many as six people would be involved in the robberies and they used stolen automobiles to commit the robberies. When the robbers arrived at the EZ Pawn stores, between two and four robbers would exit stolen vehicles and enter the stores. The robbers concealed their faces with masks or bandanas. The robbers would smash out the jewelry cases and steal high value jewelry and watches. One robber would always stand guard at the door with a black semi-automatic handgun. After committing the robberies, the robbers would drive the stolen vehicles to nearby drop-off areas where they would abandon the stolen vehicles and enter “layoff” vehicles. *Exhibit B, Affidavit*, pgs. 563-64.

Detective Beveridge stated that the robbers robbed an EZ Pawn store in Las Vegas, Nevada on September 12, 2016. Following that robbery, the robbers drove the stolen vehicle to a Mariana’s grocery store parking lot. Detectives were able to review the store’s parking lot surveillance video and observe the robbers exit the stolen vehicle and enter a black Harley Davidson F-150 model pickup. In the video, one of the robbery suspects was seen dropping clothing items and a hockey mask into the Mariana’s trash dumpster. Detectives recovered the clothing and mask from the dumpster “and confirmed through the EZ Pawn robbery video that the clothing was the same clothing worn by the suspects that committing the robbery.” DNA was collected from the clothing and the mask. *Exhibit B, Affidavit*, pg. 564.

During the course of the investigation, detectives identified Jason Goldsby as one of the March 12, 2016 robbery suspects. On October 7, 2016, detectives observed Goldsby, a juvenile identified as “D.P.,” and two other identified individuals commit a robbery at an EZ Pawn store in

1 Henderson, Nevada. At a subsequent interview, D.P. told the detectives that the person wearing the
2 hockey mask in the September 12, 2016 robbery was named “Jess.” The detectives showed D.P. a
3 photograph of Defendant Jessie Mendoza, who had previously been identified as an associate of
4 Jason Goldsby. “[D.P.] positively identified Mendoza as the person whom he knew as ‘Jess’ and
5 that he was the gunman wearing the hockey mask on the 9/12/16 EZ Pawn robbery.” *Exhibit B,*
6 *Affidavit*, pg. 565. Detective Beveridge further stated that “[i]n the 9/12/16 EZ Pawn robbery, the
7 person wearing the hockey mask appears to be a Hispanic male with a shaved head and appears to be
8 heavy set. Photographs obtained from Facebook and Nevada DMV of Jessie Mendoza match the
9 hair and body style of the gunman with the hockey mask.” *Id.* Detectives reviewed call records from
10 Jason Goldsby’s cellular telephone which showed that he had several telephone communications on
11 September 12, 2016 with telephone number 702-280-6709. Detectives found through research that
12 Defendant Mendoza had provided this number to pawn shops as his personal contact number. Based
13 on the foregoing, Detective Beveridge believed that Defendant Mendoza was the gunman during the
14 September 12, 2016 EZ Pawn robbery.

15 Detective Beveridge requested permission to execute the warrant at nighttime for the
16 following reason: “Jessie Mendoza is not currently in police custody. Detectives will attempt to
17 locate Mendoza for purposes of collecting DNA samples and it is unknown at what time of the day
18 Detectives will find him. If a night time search clause is not approved the Detectives will have to
19 release Mendoza without collecting DNA if he is found during the night time hours.” *Id.* at pg. 566.
20 The justice-of-the-peace issued the search warrant with the nighttime search clause on October 21,
21 2016. *Id.* at pgs. 568-69.

22 **2. October 22, 2016 Search Warrant for Defendant’s Residence.**

23 On October 22, 2016 at 7:28 P.M., Detective Beveridge applied to the same justice-of-the-
24 peace by telephone for a warrant to search a residence in Henderson, Nevada where Defendant
25 Mendoza was believed to reside, and to seize the following items: (1) paperwork to establish the
26 identities of the persons residing at the residence; (2) written correspondence, diaries, financial
27 records, wills and like items; (3) firearms; (4) black tee shirt with white unique design; and (5) white
28 long shorts. *Motion to Suppress* (ECF No. 36), *Exhibit A, October 22, 2016 Telephone Search*

1 *Warrant Affidavit*. Detective Beveridge again referenced a series of armed robberies of EZ Pawn
2 stores beginning on March 12, 2016. He further stated:

3 In one incident, which was documented under LVMPD Event
4 #160912-3481, the suspects were seen dumping a stolen vehicle after
5 committing an EZ Pawn robbery at [address redacted], Las Vegas,
6 Nevada. During that robbery four suspects were seen on surveillance
7 entering the EZ Pawn. Three suspects went directly to the jewelry
8 display cases and began smashing them out taking various items of
9 jewelry and watches. The fourth suspect seen on video as [sic] a
10 Hispanic male adult, weighing over 200 pounds, wearing a Jason style
hockey mask, was armed with a black handgun, and was standing
guard at the EZ Pawn front door. After the robbery was over the
suspects entered a Toyota van and fled to the Mariana's Supermarket
parking lot. Suspect four was seen on the Mariana's parking lot video
surveillance walking over to the trash dumpster and throwing all the
clothing items worn by the robbery suspects along with the hockey
mask in the dumpster.

11 *Exhibit A, Affidavit*, pg. 557.

12 Later in the affidavit, Detective Beveridge refers to the date of the above described robbery as
13 September 12, 2016. *Id.* at pg. 558. Detective Beveridge stated that crime scene investigators
14 recovered the clothing and hockey mask from the dumpster and were able to extract DNA from
15 various clothing items. He noted that "[a]fter dumping the robbery clothes suspect number four is
16 seen in the video wearing white shorts and a distinctive black tee shirt with a white design on the
17 front and back of the shirt." *Id.* at pgs. 557-58.

18 Detective Beveridge stated that Jason Goldsby was identified as one of the individuals
19 responsible for the robberies and was arrested together with three other suspects following an EZ
20 Pawn robbery on October 7, 2016. None of the four suspects arrested on October 7, 2016 matched
21 the physical description of the number four suspect from the 09-12-16 robbery. During interviews
22 with the suspects, Jessie Mendoza was identified as the hockey mask wearer in the 09-12-16 robbery.
23 A social media and Nevada DMV photo search was conducted on Jessie Mendoza and his hairstyle
24 and his body style matched that of the hockey mask suspect. Detective Beveridge stated that a check
25 of recent pawn activity showed that Defendant Mendoza provided a phone number as his primary
26 cell phone. This number was cross checked with the call detail logs of Jason Goldsby and on several
27 of the robbery dates in the series of related robberies, phone calls were made back and forth from
28 Goldsby and Mendoza. *Id.* at pgs. 558-59.

1 Detective Beveridge stated that on October 22, 2016, he conducted surveillance at a residence
2 that was the last known address of Mr. Mendoza. At approximately 4:15 P.M., he saw Mr. Mendoza
3 and his girlfriend, Angela Obidzinski, and two small children exit the residence, enter Ms.
4 Obidzinski's automobile, and drive away. A vehicle stop was conducted a short distance away.
5 Detective Beveridge spoke to Angela who stated that she and Mr. Mendoza were back together and
6 were staying at the residence. Detective Beveridge stated that a current TPO [temporary protection
7 order] prohibited Mendoza from contacting Angela. Mr. Mendoza was therefore arrested and
8 transported to the Henderson jail where Detective Beveridge executed the DNA search warrant. He
9 also informed Mr. Mendoza of the current robbery investigation and told him that the police had
10 phone records and DNA evidence that would show his involvement in the robberies. Mr. Mendoza
11 was booked into jail for the TPO violation. Detective Beveridge stated that while he was en route to
12 LVMPD Headquarters, he was informed by Henderson police officers that Mendoza called Angela
13 and told her to get rid of her phone. He also noted that the video surveillance showed that Defendant
14 Mendoza threw away clothes that were used in the September 12, 2016 robbery. *Id.* at pgs. 559-60.

15 Based on the foregoing information, Detective Beveridge requested a warrant to search the
16 residence for evidence relating to the September 12, 2016 robbery. He also requested a night time
17 search clause because "Jessie Mendoza is currently attempting to have his girlfriend, Angela, remove
18 evidence linking him to the robbery events. If detectives wait until morning to serve this warrant the
19 possibility of evidence being destroyed or removed is greatly improved." *Id.* at pg. 560. The justice-
20 of-the-peace granted the search warrant, including the provision for a nighttime search. *Id.* at pgs.
21 561-62.

22 **3. Detective Beveridge's April 5, 2017 Hearing Testimony.**

23 Detective Beveridge testified at the hearing on April 5, 2017 that he conducted surveillance
24 of the residence located at 560 Fork Mesa in Henderson, Nevada on October 22, 2016. The purpose
25 of the surveillance was to locate Defendant Mendoza and execute the search warrant for the buccal
26 swab. Detective Beveridge was wearing plain clothes and was in an unmarked automobile. Prior to
27 going to the subject residence, he conducted computer research and determined that a domestic
28 violence temporary protection order had been issued and served on Mr. Mendoza. The applicant for

1 the TPO was Angela Obidzinski. The TPO also referred to Ms. Obidzinski's children. The TPO
2 required Mr. Mendoza to stay 100 yards away from the Fork Mesa residence and also from Ms.
3 Obidzinski's place of employment, the children's school, and another address that may have been an
4 address for Ms. Obidzinski's family. After obtaining the information about the TPO, Detective
5 Beveridge investigated publically available social media sites to find out more information about Ms.
6 Obidzinski and the children, including photographs.

7 Detective Beveridge testified on cross-examination that he ran a search for information on
8 Defendant Mendoza in law enforcement databases, including one known as "CJIS." The CJIS
9 database disclosed the existence of the TPO against Mr. Mendoza. The database provided a
10 summary of the TPO, including the dates it was issued and served on Defendant, when it expired,
11 and the restrictions imposed on Defendant. Detective Beveridge testified that he relied on this
12 information in believing that Defendant Mendoza was subject to an existing TPO that prohibited him
13 from being in the presence of Ms. Obidzinski or within 100 yards of her residence. This information
14 was apparently confirmed by the Henderson Police when they subsequently placed Defendant under
15 arrest for violating the TPO. Detective Beveridge testified that Nevada law mandates that a person
16 subject to a TPO be arrested if the officer observes a violation of the order.

17 After conducting surveillance for approximately one hour, Detective Beveridge observed
18 Defendant Mendoza, Ms. Obidzinski and their two daughters exit the Fork Mesa residence and enter
19 an automobile. Detective Mendoza recognized Mr. Mendoza, Ms. Obidzinski and the children from
20 the photographs he had obtained during his research. Detective Beveridge followed the automobile
21 as it drove out of the residential neighborhood. Once the automobile was on Major Avenue,
22 Detective Beveridge activated the emergency lights and siren on his vehicle and signaled Mr.
23 Mendoza to pull over. Mr. Mendoza initially pulled over, and Detective Beveridge radioed for
24 Henderson police to provide back-up support. Approximately 20 seconds after stopping, Mr.
25 Mendoza drove off down the roadway. Detective Beveridge again followed the automobile. Mr.
26 Mendoza hung his cell phone out of the vehicle's window and it appeared to Detective Beveridge
27 that Defendant was attempting to film him. Mr. Mendoza then pulled back over to the side of the
28 roadway and stopped. Henderson police in a marked patrol car arrived approximately 20 seconds

1 after Mr. Mendoza pulled over the second time. Mr. Mendoza thereafter exited the automobile,
2 came back to Detective Beveridge's location where he was put in handcuffs and then placed in the
3 detective's car. While Detective Beveridge dealt with Mr. Mendoza, the Henderson police officers
4 completed paperwork to arrest Mr. Mendoza for violation of the TPO. Detective Beveridge
5 transported Mr. Mendoza to the Henderson detention center.

6 Detective Beveridge testified on cross-examination that he informed Mr. Mendoza of his
7 *Miranda* rights. He then told Defendant Mendoza that he was investigating the "Goldsby robberies."
8 He asked Defendant if he knew what had transpired with respect to Mr. Goldsby. Although Mr.
9 Mendoza initially stated that he wanted speak with counsel, Detective Beveridge testified that he
10 continued to speak to the detective, asked questions, and arguably made incriminating statements.
11 Defendant has moved to suppress his post-arrest statements on the ground that they were obtained in
12 violation of his *Miranda* rights. The Government stated at the hearing that it does not intend to
13 introduce Defendant's custodial statements in its case in chief. Detective Beveridge also testified
14 that he seized Defendant Mendoza's cellular telephone when he was taken into custody. He testified,
15 and the Government's counsel confirmed, that a warrant was later obtained to search the cell phone.
16 The phone was locked, however, and the Government does not have the password to unlock it. The
17 phone, therefore, has not been searched.

18 DISCUSSION

19 **1. Whether the Stop and Arrest of Defendant Violated the Fourth** 20 **Amendment.**

21 The Fourth Amendment to the United States Constitution protects "the right of the people to
22 be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures." It
23 further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or
24 affirmation, and particularly describing the place to be searched, and the persons or things to be
25 seized." When a police officer has probable cause to believe that a person has committed even a
26 minor crime in his presence, the person's arrest is constitutionally reasonable. *Virginia v. Moore*,
27 553 U.S. 164, 171, 128 S.Ct. 1598, 1604 (2008). Police officers may also rely on information in law
28 enforcement databases or record keeping systems regarding the existence of arrest warrants, criminal

convictions or similar information so long as the reliance is reasonable under the circumstances. *Herring v. United States*, 555 U.S. 135, 145–47, 129 S.Ct. 695, 703–04 (2009). Even if the information relied on is incorrect, the evidence need not be excluded. *Id.* (holding that police officer reasonably relied on incorrect information from a neighboring county sheriff’s office that there was an outstanding warrant for defendant’ arrest).

In this case, Detective Beveridge received information from the CJIS database that Defendant Mendoza was subject to an existing TPO that prohibited him from being within 100 yards of Ms. Obidzinski’s residence. The intentional violation of such an order is a gross misdemeanor. *See* Nevada Revised Statute (NRS) § 200.591.5(a). There is no evidence that the information regarding the TPO was incorrect. Detective Beveridge saw Defendant Mendoza exit the residence in the company of Ms. Obidzinski. He therefore had probable cause to arrest Defendant for violating the TPO. The stop and ensuing arrest of Defendant did not violate the Fourth Amendment.

2. Whether the Search Warrants for the Buccal Swab and Defendant’s Residence Were Supported by Probable Cause.

Defendant Mendoza argues that the search warrants for the buccal swab and search of his residence were not supported by probable cause and that the evidence obtained as a result of those warrants should be suppressed. Whether a search warrant is supported by probable cause must be determined from the “four corners” of the affidavit. *United States v. Anderson*, 453 F.2d 174, 176–77 (9th Cir. 1971); *United States v. Gourde*, 440 F.3d 1065, 1067 (9th Ci. 2005); *United States v. Luong*, 470 F.3d 898, 904–05 (9th Cir. 2006). In deciding whether to issue a search warrant, the magistrate or judicial officer is required to make a practical, commonsense decision whether given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime with be found on the person or at the place to be searched. *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317 (1983)). “[T]he duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing] that probable cause existed.’” *Id.* As stated in *Illinois v. Gates*, “[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be the mere ratification of the bare conclusions of

1 others.” 462 U.S. at 239, 103 S.Ct. at 2332. “[A] warrant affidavit must set forth particular facts
2 and circumstances ... so as to allow the magistrate to make an *independent* evaluation of the matter.”
3 *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (quoting *Franks v. Delaware*, 438 U.S.
4 154, 165, 98 S.Ct. 2674 (1978)). The magistrate’s determination of probable cause is entitled to
5 great deference by the reviewing court. *Krupa*, 658 F.3d at 1177 (citing *Millender v. County of Los*
6 *Angeles*, 620 F.3d 1016, 1025 (9th Cir. 2010); *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir.
7 2007); and *United States v. Battershell*, 457 F.3d 1048, 1050 (9th Cir. 2006)).

8 Detective Beveridge’s October 21, 2016 affidavit in support of the search warrant for the
9 buccal swab provided the following information in support of probable cause: (1) The September
10 12, 2016 EZ Pawn store robbery was one of a series of robberies committed by the same gang; (2)
11 surveillance video from the Mariana’s grocery store parking lot on September 12, 2016 showed the
12 robbers exit the stolen vehicle used in the robbery and enter another vehicle. One of the robbers
13 dropped clothing and a hockey mask into a dumpster that the video from the EZ Pawn store showed
14 was the same clothing worn by the robbers. DNA was obtained from that clothing; (3) Jason
15 Goldsby was identified as one of suspects in the earlier March 10, 2016 EZ Pawn robbery; (4)
16 Goldsby, D.P., and two other individuals were taken into custody after committing another EZ Pawn
17 robbery on October 7, 2016; (5) D.P. told the police that the person wearing the hockey mask during
18 the September 12, 2016 robbery was named “Jess” and he identified a photograph of Defendant
19 Mendoza as the person who wore the hockey mask during the September 12th robbery; (6) video
20 from the EZ Pawn robbery showed that the person wearing the hockey mask appeared to be a heavy
21 set Hispanic male with a shaved head; (7) photographs of Defendant Mendoza matched this general
22 description of the robber; and (8) records for Goldsby’s telephone number and a telephone number
23 identified as one used by Defendant Mendoza showed several calls between their numbers on
24 September 12, 2016.

25 The information provided by Detective Beveridge in his October 22, 2016 telephonic
26 affidavit was substantially the same as that provided in his October 21st written affidavit—with the
27 additional information regarding Defendant’s arrest on October 22nd, and the evidence connecting
28 him to the residence to be searched. The October 22, 2016 affidavit was more general in stating that

1 “[d]uring interviews with suspects in custody, Jessie Mendoza was identified as the hockey mask
2 wearer in the 09-12-16 robbery.” *Exhibit A, Affidavit*, pg. 558. It also differed from the previous
3 affidavit in stating that there was telephone contact between Justin Goldsby’s and Defendant’s
4 telephone numbers on “several of the robbery dates in the series,” rather than on September 12, 2016
5 as stated in the October 21st affidavit. Both affidavits provided only general assertions connecting
6 the September 12, 2016 robbery and the earlier EZ Pawn robberies to a single gang of robbers.
7 Although the telephonic search warrant affidavit was submitted to the same justice-of-the-peace one
8 day after the affidavit for the buccal swab warrant, Detective Beveridge did not incorporate his first
9 affidavit into the telephonic affidavit. Given the four corners rule, the determination whether
10 probable cause existed to search Defendant’s residence must be made solely from the information
11 contained in the telephonic affidavit. *Cf. United States v. Sitton*, 968 F.2d 947, 956 (9th Cir. 1992),
12 *abrogated on other grounds by Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996) (earlier
13 affidavit attached to the second affidavit and incorporated into it by reference could be considered in
14 determining probable cause).

15 The facts set forth in the October 21, 2016 affidavit provided a substantial basis on which to
16 conclude that there was probable cause to believe that Defendant Mendoza was the robber depicted
17 in the September 12, 2016 surveillance video wearing the hockey mask. The affidavit stated that EZ
18 Pawn store surveillance video showed that the robber wearing the hockey mask appeared to be a
19 heavy set Hispanic male with a shaved head. The affidavit indicated that this appeared to be the
20 same person shown in the Mariana’s store surveillance video dropping clothing and a hockey mask
21 into a dumpster. D.P. identified a photograph of Defendant Mendoza as the robber known to him as
22 “Jess,” whom he also identified as the robber wearing the hockey mask during the September 12,
23 2016 robbery. The affidavit did not explain the basis of D.P.’s knowledge. The implication is that
24 D.P. was present during the September 12, 2016 robbery. The affidavit also connected Defendant
25 Mendoza to the robbery based on the September 12, 2016 telephone calls between his phone and that
26 of Justin Goldsby.

27 The October 22nd telephonic affidavit was more vague in stating Defendant Mendoza was
28 identified during interviews with the suspects in the October 7th robbery as the robber wearing the

1 hockey mask in the September 12, 2016 robbery. The affidavit was also more vague with respect to
2 connecting the phone calls between Goldsby's and Defendant's phones on the day of the subject
3 robbery. This vagueness in the telephonic affidavit lessens the strength of the information
4 supporting probable cause in the second affidavit and therefore makes it more debatable whether
5 there as a substantial basis for the justice-of-the-peace's conclusion that probable cause existed.

6 Defendant also argues that the telephonic affidavit did not establish a sufficient nexus
7 between the items to be seized and the place to be searched. *Motion* (ECF No. 36), pg. 10.
8 Defendant relies on *United States v. Grant*, 682 F.3d 827, 835 (9th Cir. 2012) and *United States v.*
9 *Hendricks*, 743 F.2d 653 (9th Cir. 1984). In *Grant*, the police obtained a warrant to search the
10 defendant's house for a handgun believed to have been used in a murder that occurred nearly nine
11 months earlier. There was no evidence connecting the defendant to the murder, although there was
12 evidence to connect one or two of his sons. The sons did not reside with the defendant and only one
13 of the sons stayed at the defendant's house. This, however, did not occur until six months after the
14 murder. The murder weapon was not found during the search, but two other hand guns and
15 ammunition were found, and the defendant was charged with being a felon in possession of firearms
16 and ammunition in violation of 18 U.S.C. § 922(g)(1). The court held that the affidavit did not
17 provide a fair probability that the gun or ammunition from the homicide would be found in the
18 defendant's home. *Hendricks* involved a scenario in which a magistrate issue a search warrant for
19 the defendant's residence that was conditional on a box containing narcotics being picked up by the
20 defendant and brought to his house. The court held that at the time the warrant was issued, the
21 magistrate did not have sufficient grounds to believe that the defendant would pick up the box and
22 take it to his house. Therefore, the warrant was not supported by probable cause. *Hendricks*, 743
23 F.2d at 655.

24 This case is distinguishable from *Grant* and *Hendricks*. The police applied for the search
25 warrant one month and ten days after the September 12, 2016 robbery. They sought permission to
26 seize firearms potentially used in the robbery and particular items of clothing worn by the robber
27 who guarded the door to the EZ Pawn store and who disposed of other articles of clothing and the
28 hockey mask after the robbery. If Defendant Mendoza was the robber seen on the surveillance video,

1 then it was reasonable to believe that such items would still be in his possession and located in his
2 current place of residence.¹ Defendant was observed leaving the residence with his girlfriend and
3 their children on the date the warrant application was made. The girlfriend also told Detective
4 Beveridge that she and Defendant were again residing together in the residence. Accordingly, there
5 was a reasonable nexus between the items to be seized and the place to be searched.

6 If the facts set forth in the search warrant affidavit are not sufficient to support a finding of
7 probable cause, the good faith exception to the exclusionary rule does not require suppression of the
8 evidence if the police officers had an objectively reasonable basis to rely on the validity of the
9 warrant. *United States v. Leon*, 468 U.S. 897, 922–25, 104 S.Ct. 3405, 3420–22 (1984); *United States*
10 *v. Grant*, 682 F.3d at 836. The good faith exception does not apply, however, if (1) the issuing judge
11 was misled by information in the affidavit that the affiant knew was false, or would have known was
12 false but for his reckless disregard of the truth. *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421 (citing
13 *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978)). The exception also does not apply if (2)
14 the issuing judge wholly abandoned his judicial role in issuing the warrant; (3) the affidavit was so
15 lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;
16 or (4) the warrant was so facially deficient, such as failing to state the particular the place to be
17 searched or the things to be seized, that the executing officers could not reasonably presume it to be
18 valid. *Id.* Factors (2), (3) and (4) do not negate application of the good faith exception in this case.
19 The affidavits stated that Defendant matched the general physical description of the robber. At least
20 one of the suspects in the October 7, 2016 robbery identified Defendant as the robber wearing the
21 hockey mask during the September 12, 2016 robbery. Telephone call records connected Defendant
22 to another robbery suspect, Goldsby, on the day of the September 12, 2016 robbery or on the days
23 that previous robberies were committed. It was therefore objectively reasonable for the officers to
24 believe that the search warrants were valid.

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28 ¹ The warrant return states that one black shirt and two pairs of white shorts were seized during the search. *Motion* (ECF No. 36), *Exhibit D*.

1 **3. Whether the Nighttime Search Clauses Were Invalid.**

2 Defendant argues that the nighttime search clauses in the warrants were not supported by
 3 reasonable grounds and were therefore invalid. Rule 41(e)(2)(ii) of the Federal Rules of Criminal
 4 Procedure states that “[t]he warrant must command the officer to: execute the warrant during the
 5 daytime, unless the judge for good cause expressly authorizes execution at another time.” Daytime is
 6 defined as the hours between 6:00 A.M. and 10:00 P.M. Rule 41(a)(2)(B). The mere existence of
 7 probable cause to believe that drugs or weapons will be found at the premises does not justify a
 8 nighttime search. *Bravo v. City of Santa Monica*, 665 F.3d 1076, 1085–86 (9th Cir. 2011). A
 9 nighttime search may be authorized only if the affidavit shows that there are exigent circumstances.
 10 This includes information showing that the object of the search or his associates are likely to destroy
 11 evidence if the warrant is not immediately executed. *United States v. Stefanson*, 648 F.2d 1231,
 12 1236 (9th Cir. 1981). *See also United States v. Fowlkes*, 804 F.3d 954, 970 (9th Cir. 2015)
 13 (“Exigent circumstances include those circumstances that would cause a reasonable person to believe
 14 that entry . . . was necessary to prevent . . . the destruction of relevant evidence.”) (internal quotation
 15 marks and citations omitted).

16 Whether exigent circumstances existed to justify the nighttime search clause in the buccal
 17 swab search warrant is a moot point. Defendant was arrested in the daytime hours and the buccal
 18 swab was thereafter obtained from him at the jail. The nighttime clause was not invoked. The
 19 search of Defendant’s residence was apparently executed at night.² Detective Beveridge informed
 20 the judge that the nighttime search clause was necessary because Defendant had already called his
 21 girlfriend from jail and told her to get rid of her phone. He also noted that Defendant had previously
 22 thrown away clothes used in the robbery. *Motion* (ECF No. 36), *Exhibit A, Affidavit*, pg. 559. This
 23 information provided a substantial basis to support the judge’s authorization for a nighttime search.
 24 The search of the residence at nighttime did not violate the Fourth Amendment.

25 . . .

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 28 ² The Court has not been informed what time the search of the residence occurred. The Government has not asserted, however, that it occurred during the daytime hours.

1 **4. Defendant’s Request for a *Franks* Evidentiary Hearing.**

2 Defendant Mendoza argues that the affidavits contained material misrepresentations or
 3 omissions of fact that require the Court to conduct an evidentiary hearing pursuant to *Franks v.*
 4 *Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). “Under *Franks*, a criminal defendant has the right to
 5 challenge the veracity of statements made in support of an application for a search warrant.” 438
 6 U.S. at 155–56. To prevail on a *Franks* challenge, the defendant must establish two things by a
 7 preponderance of the evidence; first, that the “affiant officer intentionally or recklessly made false or
 8 misleading statements or omissions in support of the warrant[,]” and second, that the false or
 9 misleading statement or omission was material, *i.e.*, “necessary to finding probable cause.” *United*
 10 *States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (quoting *United States v. Martinez-Garcia*,
 11 397 F.3d 1205, 1214–15 (9th Cir. 2005)). “If both requirements are met, ‘the search warrant must be
 12 voided and the fruits of the search excluded. . . .’” *Id.* (quoting *Franks*, 438 U.S. at 156). The
 13 allegation of a *Franks* violation does not automatically entitle the defendant to an evidentiary
 14 hearing. *Franks* states:

15 There is, of course, a presumption of validity with respect to the
 16 affidavit supporting the search warrant. To mandate an evidentiary
 17 hearing, the challenger’s attack must be more than conclusory and
 18 must be supported by more than a mere desire to cross-examine. There
 19 must be allegations of deliberate falsehood or of reckless disregard for
 20 the truth, and those allegations must be accompanied by an offer of
 21 proof. They should point out specifically the portion of the warrant
 22 affidavit that is claimed to be false; and they should be accompanied
 23 by a statement of supporting reasons. Affidavits or sworn or otherwise
 24 reliable statements of witnesses should be furnished or their absence
 25 satisfactorily explained. Allegations of negligence or innocent mistake
 26 are insufficient.

27 438 U.S. at 171.

28 The Ninth Circuit has articulated five requirements that a defendant must satisfy to justify an
 evidentiary hearing: (1) the defendant must allege specifically which portions of the warrant affidavit
 are claimed to be false; (2) the defendant must contend that the false statements or omissions were
 deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany
 the allegations; (4) the veracity of only the affiant must be challenged; and (5) the challenged
 statements must be necessary to find probable cause. *United States v. Dicesare*, 765 F.2d 890, 894–

95 (9th Cir. 1985). If the defendant makes a substantial showing that the affidavit contains intentionally or recklessly false statements, “and if, when the material that is the subject of the alleged falsity is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.” *Franks*, 438 U.S. at 171–72. If the remaining content is insufficient to support probable cause, however, then the defendant is entitled to an evidentiary hearing. *Id.*

Intentional or reckless omissions may also provide grounds for a *Franks* hearing. *United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2007) states:

“A search warrant, to be valid, must be supported by an affidavit establishing probable cause.” *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir.1985). In *Stanert*, we applied the rationale of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), to hold that a defendant could challenge a facially valid affidavit by making a substantial preliminary showing that “the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading.” *Stanert*, 762 F.2d at 781 (“By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning.”) In addition, the defendant must show that the “affidavit, once corrected and supplemented,” would not “provide ... a substantial basis for concluding that probable cause existed” to search defendant's residence. *Id.* at 782.

Clear proof of deliberate or reckless omissions is not required to obtain an evidentiary hearing. *United States v. Stanert*, 762 F.2d at 781. The “omission rule,” however, does not require that the affiant address every possible theory, no matter how unlikely, that would controvert the affiant’s good-faith belief that probable cause exists for the search. *United States v. Craighead*, 539 F.3d 1073, 1081 (9th Cir. 2008).

Defendant argues that the following matters constituted material misrepresentations or omissions in the search warrant affidavits:

1. The affidavits stated that the suspect wearing the hockey mask was Hispanic. The affidavit did not inform the justice-of-the-peace that eyewitnesses identified the suspect wearing the hockey mask as a black male. *Motion* (ECF No. 36), pg. 13. In support of this assertion, Defendant cites the September 12, 2016 Henderson Police Department report which stated:

...

1 On 9/12/16 at approximately 1939 hours, 4 Black Males entered the
2 EZ Pawn at [redacted] wearing masks and gloves. 1 male, wearing a
3 gray sweatshirt, black pants, and a "Jason" style hockey mask. . . . The
first male with the hockey mask stood by the front door and acted as a
lookout and had a handgun in his hand per video surveillance.

4 *Motion* (ECF No. 36), *Exhibit E*, pg. 346.

5 Although Defendant states that "eyewitnesses" identified the robbers as four black males, the
6 police report indicates that the description of the robbers was based on a review of the EZ Pawn
7 store's surveillance video.

8 2. The affidavit stated that the "fourth suspect" wearing the hockey mask in the September
9 12, 2016 robbery "was seen on the Mariana's parking lot video surveillance walking over to the trash
10 dumpster and throwing all the clothing items worn by the robbery suspects along with the hockey
11 mask in the dumpster." Defendant asserts that the surveillance video from Mariana's was of very
12 poor quality and there is no way to tell from the video who the person is, "let alone to unequivocally
13 state under oath to a judge that the person in the Mariana's surveillance video is 'suspect number
14 four.'" *Motion* (ECF No. 36), pg. 13. Defendant has attached still screen shots from the Mariana's
15 surveillance video to support his argument. *Motion* (ECF No. 36), *Exhibit F*.

16 3. The affidavits omitted information as to how law enforcement officers identified
17 Defendant Mendoza as a suspect in the robbery and connected him to Defendant Goldsby before the
18 officers obtained his photograph and showed it to D.P. on October 7, 2016.

19 4. The affidavit for the search of Defendant's residence was misleading because it stated that
20 "[d]uring the interviews with the suspects in custody Jessie Mendoza was identified as the hockey
21 mask wearer in the 09-12-16 robbery." *Motion* (ECF No. 36), pg. 14. Defendant argues that this
22 statement was misleading because it (1) indicates that all of the suspects arrested on October 7, 2016
23 identified Defendant Mendoza as the person wearing the hockey mask during the September 12,
24 2016 robbery; (2) omits any details concerning D.P.'s limited identification of only a person named
25 Jess and the detective's one man photo lineup; and (3) omits any indication that detectives had
26 identified Mr. Mendoza as a suspect before the October 7, 2016 robbery and resulting interrogations.

27 5. The affidavits omitted information about how the detectives located a cell phone number
28 associated with Mr. Mendoza which they then determined had been in contact with a phone number

1 used by Goldsby. *Motion* (ECF No. 36), pg. 15.

2 The Government did not address Defendant's arguments in support of his request for a
3 *Franks* hearing in its original response to the motion to suppress. The Government only addressed
4 the issue of whether an evidentiary hearing should be conducted to determine whether the stop of
5 Defendant's vehicle was lawful. *See Response* (ECF No. 41), pgs 13-14. Defendant argued at the
6 April 5, 2017 hearing that given the Government's failure to respond to his arguments, the *Franks*
7 hearing should be granted. The Court, however, was doubtful that Plaintiff had made the requisite
8 showing for a *Franks* hearing, and therefore invited the parties to file supplemental briefs. The
9 parties' supplemental briefs are unhelpful. Defendant did not further explain why an evidentiary
10 hearing is justified. *See Supplement to Motion to Suppress* (ECF No. 63). The Government
11 provided a recitation of the legal requirements for finding a *Franks* violation, but, once again, did not
12 address Defendant's factual assertions as to why an evidentiary hearing should be granted. *Response*
13 (ECF No. 64). Contrary to the Government's repeated assertions, the Court did not hold that
14 Defendant has failed to show that a *Franks* hearing is required. If the Court had reached that
15 conclusion, it would not have invited supplemental briefs.

16 Defendant's third, fourth and fifth factual assertions do not allege misrepresentations or
17 omissions that justify an evidentiary hearing. The affidavits stated that the detectives identified
18 Mendoza's telephone number through his contacts with pawn stores in which he had provided the
19 telephone number as his primary contact number. Defendant has made no showing that this
20 information is false. Defendant makes a valid point that the telephonic affidavit in support of the
21 search warrant for the residence could be read as indicating that more than one suspect in the
22 October 7, 2016 robbery identified Defendant Mendoza as the robber wearing the hockey mask in
23 the September 12, 2016 robbery. The first affidavit stated that only D.P. identified Mendoza.
24 *Motion* (ECF No. 36), *Exhibit B, Affidavit*, pg. 565. Defendant has not provided any evidence that
25 the first affidavit misrepresented the nature of D.P.'s identification of Defendant. D.P. was shown a
26 single photograph of Mr. Mendoza and identified him as the robber wearing the hockey mask in the
27 September 12, 2016 robbery. If the telephonic affidavit was corrected to reflect the information in
28 the first affidavit, it would still provide evidence supporting the identification of Defendant as the

1 robber wearing the hockey mask.

2 Defendant argues that the affidavits omitted information as to how that detectives initially
3 identified Mendoza as a robbery suspect. The absence of such information, however, does not
4 require a *Franks* hearing. Detective Beveridge asserted in the affidavits that there was probable
5 cause to believe that Defendant Mendoza was the robber wearing the hockey mask during the
6 September 12, 2016 robbery and he set forth the facts upon which the assertion was made. What
7 first led the police to suspect that Defendant was involved in the robbery is not essential to the
8 finding of probable cause, unless Defendant can also show that the omitted information would have
9 materially undermined a finding of probable cause.

10 Defendant's first and second assertions raise legitimate questions as to whether the affidavits
11 omitted or misrepresented information that was material to the identification of Defendant as the
12 robber wearing the hockey mask in the September 12, 2016 robbery. The first assertion is the
13 omission of the statement in the police report that the four robbers were all "black males." The
14 second assertion is whether Defendant could be reasonably identified as the robber wearing the
15 hockey mask in the surveillance video from the Mariana's parking lot. Both of these questions may
16 potentially be resolved by viewing the surveillance video from the EZ Pawn store and the Mariana's
17 parking lot. It is reasonably possible for an Hispanic individual to be erroneously identified as
18 African-American, especially if the individual is wearing a mask. Even if the surveillance video
19 from the Mariana's parking lot is of poor quality, it may still be possible to identify the individual
20 shown in that video as the same person wearing the hockey mask in the EZ Pawn robbery video.
21 The Court will therefore conduct an evidentiary hearing regarding these two issues. The Court
22 expects the parties to present the surveillance videos from the EZ Pawn store and the Mariana's
23 parking lot (assuming that they are still available). Detective Beveridge should also testify regarding
24 these matters.

25 CONCLUSION

26 Detective Beveridge had probable cause to stop and arrest Defendant Mendoza on October
27 22, 2016 for a violation of the the temporary protection order. Any evidence acquired as a result of
28 that stop was not illegally seized. Based on the information contained in the search warrant

1 affidavits, the justice-of-the-peace had a substantial basis for concluding that probable cause existed
2 to support the issuance of the search warrants for the buccal swab and Defendant's residence.
3 Furthermore, the police officers had an objectively reasonable basis to believe in the validity of the
4 warrants so long as the Detective Beveridge did not intentionally or recklessly misrepresent or omit
5 any material facts. The validity of the nighttime search clause in the buccal swab warrant is moot.
6 The telephonic affidavit in support of the search warrant for Defendant's residence provided exigent
7 circumstances that justified a nighttime search.

8 The Court will conduct an evidentiary hearing to determine whether the information in the
9 police report that the suspects in the September 12, 2016 were black males was intentionally or
10 recklessly omitted from the affidavits and whether such omission was material. The Court will also
11 conduct an evidentiary hearing to determine whether the statements in the affidavits identifying the
12 individual in the Mariana's parking lot surveillance video as the same person wearing the hockey
13 mask during the robbery was false, and, if so, whether the false statement was intentionally or
14 recklessly made. The other grounds asserted by Defendant do not justify a *Franks* evidentiary
15 hearing.

16 RECOMMENDATION

17 **IT IS RECOMMENDED** that Defendant's Motion to Suppress (ECF No. 36) be **denied**,
18 except in regard to the issues on which the Court will conduct a *Franks* evidentiary hearing. The
19 Court will issue further findings and recommendations after the evidentiary hearing is concluded.

20 ORDER


21 **IT IS HEREBY ORDERED** that an evidentiary hearing pursuant to *Franks v. Delaware*,
22 438 U.S. 154, 98 S.Ct. 2674 (1978) is set for **May 25, 2017 at 9:30 a.m.** in Las Vegas Courtroom
23 3A.

24 NOTICE

25 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
26 writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held
27 that the courts of appeal may determine that an appeal has been waived due to the failure to file
28 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also

1 held that (1) failure to file objections within the specified time and (2) failure to properly address and
2 brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
3 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
4 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

5 DATED this 10th day of May, 2017.

6 
7 GEORGE FOLEY, JR.
8 United States Magistrate Judge
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